IN THE

Supreme Court of the United States

October Term, 1957

No. 90

COLUMBIA BROADCASTING SYSTEM, INC., THE AMERICAN TOBACCO COMPANY, and JACK BENNY,

Petitioners,

vs.

LOEW'S, INC., and PATRICK HAMILTON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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BRIEF OF PETITIONERS.

Opinions Below.

The opinion of the District Court [R. 223-274] is reported at 131 Fed. Supp. 165. The opinion of the Court of Appeals [R. 276-284] is reported at 239 F. 2d 532.

Jurisdiction.

The judgment of the Court of Appeals [R. 285] was entered on December 26, 1956. The petition for writ of certiorari was filed on March 13, 1957, and was granted on April 29, 1957 [R. 286; 353 U. S. 946]. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Statutes Involved.

Article I of the Constitution of the United States provides in pertinent part as follows:

> "Section 8. The Congress shall have Power . . . To promote the Progress of Science and useful Arts. by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;"

The Copyright Act, 17 U. S. C. §1, provides in pertinent part as follows:

> "§1. Exclusive rights as to copyrighted works.
>
> "Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:
>
> "(a) To print, reprint, publish, copy, and vend the copyrighted work;
>
> "(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art;
>
> "(c) . . . to play or perform it [the copyrighted work] in public for profit, and to exhibit represent, produce, or reproduce it in any manner or by any method whatsoever . . . and
>
> "(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole

or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever;"

Question Presented.

Did the court below err in holding that the doctrine of "fair use" is inapplicable to parody and burlesque, and that accordingly the author of a parody or burlesque of a copyrighted work is limited to only such insubstantial use of that work as is permitted the ordinary literary appropriator?

Statement.

This action was instituted by respondents to restrain petitioners from performing a parody or burlesque of respondents' copyrighted motion picture "Gaslight." The facts are not in dispute and were, in the main, stipulated [R. 47-75].

Prior to December 5, 1938, respondent Patrick Hamilton, a British author, wrote an original play entitled "Gas Light" which subsequently was published, performed, and protected by copyright both in England and the United States [R. 49-52]. Respondent Loew's acquired exclusive motion picture rights to the play on October 7, 1942, for $150,000, and subsequently Loew's paid screenwriters $126,691.98 to adapt the drama to the screen [R. 52-53]. Thereafter Loew's produced an original feature length (1 hour and 40 minutes) motion picture photoplay of the drama in which Charles Boyer, Ingrid Bergman and Joseph Cotten had starring roles [R. 53-54]. The photoplay which was entitled "Gaslight,"

was published with appropriate copyright notice on May 5, 1944, and thereafter it was released for national and international distribution [R. 53-54]. It was withdrawn from domestic release in November, 1946, but its international distribution still continues [R. 56]. Up to August 31, 1952, the total production and distribution cost was $2,458,275.18, its total domestic and foreign revenues were $4,857,059.92, and nearly 52 million people had seen the picture [R. 55]. While it is customary for some successful motion pictures to be reissued five or more years after their initial release, "Gaslight" has not yet been reissued [R. 56].

Since 1932, it has been the custom of the Jack Benny radio or television program to present short burlesques or parodies which poke fun at specific motion pictures and which are written especially for the program [R. 57]. Of a total of 62 motion pictures burlesqued by Benny, the evidence showed that consent was obtained from the copyright holder on 5 of the pictures and that the literary material of 12 of the pictures was in the public domain [R. 57-62].

In January, 1952, Barbara Stanwyck and Benny were featured on the Jack Benny program in a live television parody or burlesque poking fun at the motion picture "Gaslight" [R. 64]. The burlesque had been especially written (at a cost of $5,716.66) for the program, which was sponsored by petitioner The American Tobacco Company and was telecast over the television network of petitioner Columbia Broadcasting System. [R. 64-66]. Thereafter Loew's notified CBS that it had exclusive rights to the production of "Gaslight," but CBS replied that the broadcast was a parody or burlesque and in its opinion did not infringe the Loew's copyright [R. 65-67].

About May 28, 1953, CBS commenced the preparation of a filmed television playlet (approximately 15 minutes in length) entitled "Autolight" which burlesqued "Gaslight" [R. 67, 69, 70]. It was the intention of CBS to broadcast the parody or burlesque, which again starred Benny and Barbara Stanwyck, as a part of the filmed Jack Benny half-hour television program advertising Lucky Strike cigarettes, manufactured by petitioner The American Tobacco Company [R. 67-68]. On June 9, 1953, Loew's notified respondents that it considered the making of "Autolight" to be an infringement of their copyright to "Gaslight," and on June 10, Loew's filed this action [R. 68]. The District Court entered a temporary restraining order against the production or performance of the parody or burlesque [R. 68]. The order was subsequently modified to permit the filming and printing of the proposed television performance but the film was impounded pending trial of the action [R. 25-27, 68].

For the convenience of the Court, a synopsis of the motion picture "Gaslight" and the television parody "Autolight" are set forth in the Appendix, pages 1-9. Both the District Court and the Court of Appeals viewed the motion picture and the television parody [R. 283], and arrangements will be made to permit the Court to view the films if it wishes to do so.

On May 6, 1955, District Judge Carter rendered an opinion in favor of respondents herein [R. 223-274]. The court held that "parodized or burlesque taking is to be treated no differently from any other appropriation; that, as in all other cases of alleged taking, the issue becomes first one of fact, i. e., what was taken and how substantial was the taking; and if it is de-

termined that there was a substantial taking, infringement exists" [R. 252]. On this question of fact, the court concluded that "there has been a substantial taking by defendants from the plaintiff's copyrighted property" [R. 230]. The doctrine of fair use, the court indicated, does not justify any substantial use of a copyrighted work in the creation of a parody or burlesque [R. 252]. On May 20, 1955, the court entered findings of fact, conclusions of law and judgment which enjoined the performance of the filmed television program and ordered the prints thereof to be delivered up for destruction [R. 76-91].

The Court of Appeals affirmed on December 26, 1956 [R. 285]. It adopted the holding of the District Court that a "parodized or burlesque taking is to be treated no differently from any other appropriation" and "if it is determined that there was a substantial taking, infringement exists" [R. 284]. The Court of Appeals announced flatly that a burlesque presentation is "no defense to an action for infringement of copyright" and that "up to the time of the present controversy, no federal court, in any adjudication, has supposed that there was a doctrine of fair use" applicable to burlesque or parody [R. 283-284].

Summary of Argument.

I.

A. Under the copyright clause of the Constitution, the primary purpose for granting authors and publishers limited monopoly rights in the publication of their writings is "to promote the Progress of Science and useful Arts." The Copyright Act must be construed in the light of this constitutional purpose. The monopoly granted by the Act may not properly be extended to the point where its net effect is to discourage or destroy literary creativeness. Courts have always recognized this inherent limitation and have held that the copyright monopoly is not only limited in time, but in scope as well.

B. One of the limitations in scope is the judicially-established principle of fair use which denies to the copyright proprietor the right to prevent or control uses of his work which are themselves necessary or desirable to independent creativeness. An illustration (closely analogous to the case at bar) of this widely-recognized principle is the right of literary critics or reviewers to make a "fair use" of substantial amounts of protectible material in their work. While there are many types of fair use and a comprehensive definition is difficult, the unifying element is the Constitution which requires that copyright protection promote, not retard, literary creativeness.

C. The ancient and honorable art forms of parody and burlesque are entitled to the full benefit of the principle of fair use. They serve an eminently useful and desirable purpose not only because of their inherent nature as criticism, but because they provide amusement and delight. By their very nature, they require use—ordinarily a sub-

stantial use—of the contents of the works selected as the object of their satire; otherwise they cannot exist.

The lower courts have here fallen into the error of assimilating parody with plagiarism. They have applied the same restrictive rule governing the use of a copyrighted work to the burlesquer that is applied to the literary thief, and have consequently denied to parody and burlesque the necessary freedom which should be accorded them under the recognized principles of fair use. As a result, not only "Autolight," but many of the best known parodies and burlesques become illegitimate and the whole art is strait-jacketed.

D. The application of the principles of fair use to parody and burlesque fulfills the constitutional objective. It does not deprive the original author of his just reward, for "fair use" does not and should not permit a use which would allow the new work to supersede the original under the guise of parody or burlesque. At the same time the acknowledgment of the right of the parodist and burlesquer freely to produce his independent creation will stimulate and promote an important and useful art. Such an acknowledgment is in accordance with the purposes of the Act, the applicable authorities, and the unbroken custom and tradition of the art.

II.

If the doctrine of fair use is given its proper scope, petitioners' parody, "Autolight," does not infringe respondents' motion picture. It is not a substitute for nor does it supersede "Gaslight." Rather, it is a new work in a distinctive and valuable form of literature which is entitled to be fostered and encouraged.

I.

An Author's Limited Rights in His Copyrighted Work Do Not Include the Right to Prevent Fair Use of the Work in the Creation of a Bona Fide Parody or Burlesque.

Introduction.

This case breaks new ground. This Court is presented for the first time with the question whether and under what circumstances use of a copyrighted work in the creation of a parody or burlesque of the work amounts to a copyright infringement. The uniqueness of that question makes it desirable to consider briefly the nature of parody and burlesque before proceeding to the legal argument.

Parody and burlesque constitute a wide genre of literary or dramatic composition lying within the realm of comedy in which an author seizes upon some well known "original" and, through distortion, inversion, exaggeration and all the comic arts, transforms the seriousness of the original into laughter.* By definition, there must be

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*The Shorter Oxford English Dictionary defines "burlesque" as "That species of composition which excites laughter by caricature of serious works, or by ludicrous treatment of their subjects; a literary or dramatic work of this kind," and "parody" as "A composition in which the characteristic turns of thought and phrase of an author are mimicked and made to appear ridiculous, especially by applying them to ludricously inappropriate subjects." Although technical distinctions can be made between burlesque, parody, travesty, and satire, the scholars themselves have not settled upon a definition of the terms and the question presented here does not require that a differentiation be made.

Of course, any subject, either general or specific, can be burlesqued—social or national groups; institutions such as the church, a sect, or a political party; customs and manners; individual persons; and so on. The words "burlesque" and "parody" are used in this brief to refer to literary parodies or burlesques—the lampooning of particular literary works of a particular author.

an "original" to burlesque or parody and such original must be one which may be expected to be familiar to the audience of the parodist or burlesquer. Moreover, because the author produces his comic effect by stimulating mental contrast, he must cause his audience to recall clearly the mood and content of the original and especially those features which he has selected as the object of his parody. Thus he must use enough of the original (which is almost always serious or takes itself seriously) to make perfectly sure that such clear recollection will be produced, and thus that his own creative efforts will attain the desired result in the minds of his audience. Because of this essential element of mental contrast, a parody or burlesque is not simply a humorous work; it is inevitably a critique of the original, and its nature as criticism is widely acknowledged.*

From the time of the Greeks, the greatest works of art and literature have been regularly burlesqued or parodied.** Homer's Iliad provoked the Battle of the Frogs and Mice (the Batrachomyomachia). The first modern English novel, Samuel Richardson's "Pamela: Or Virtue Rewarded" (1740), brought forth in 1741 the hilarious but penetrating "An Apology for the Life of Mrs. Shamela Andrews" by Henry Fielding. Since that time, "there have been very few important novels, verses or plays that have not been burlesqued in their own time" [R. 152]. To illustrate the genre of literary parody and burlesque, we have set forth in the Appendix

*See pp. 28-29, *infra*.

**There is an engaging summary of the history and tradition of literary parody and burlesque by Dr. Frank C. Baxter at R. 147-152; see also Kitchin, Survey of Burlesque and Parody in English (Oliver and Boyd ed. 1931); Shepperson, The Novel in Motley; A History of the Burlesque Novel in English (1936); Baddeley, Burlesque Tradition in the English Theatre (1952).

the text or summaries of several well known prose parodies or burlesques, together with synopses of the "originals" which they lampooned.*

Novel questions require examination of first principles. Thus we turn initially to consider the Constitutional origins of an author's copyright.

A. The Primary Purpose of the Copyright Clause of the Constitution Is to Empower Congress to Promote the "Progress of Science and Useful Arts" for the Benefit of the Public.

The Constitution (Art. I, §8) provides that:

> "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;"

The striking fact about this clause is the clarity with which it shows that the primary purpose for which Congress was empowered to grant rights to authors and inventors was to encourage further writing and invention, and thus to promote the progress of such endeavors. The men of Revolutionary times were especially cognizant of the fact that the written, as well as the spoken, word molds a man's mind, and that men's minds construct their

*The short synopses in the Appendix, being necessarily limited to little more than the bare bones of the "story" involved, do not and cannot portray the real literary values of the works, for the story is usually of minor importance as far as such values are concerned. This is especially true where the work being synopsized is a parody or burlesque, since the whole charm and value of these art forms lie in the treatment alone. Nevertheless, the synopses in the Appendix may serve to show the extent to which able parodists and burlesquers customarily use the contents of the target-work in the practice of the art.

worlds. By offering encouragement to intellectual creation through the promise of some adequate reward, the new country could be assured the food for mental growth. By this clause, coupled with the right to free speech protected by the First Amendment, the inhabitants of this country could be guaranteed the full and free development and dissemination of learning, information and ideas.

The history behind the Copyright clause of the Constitution emphasizes the reasons for its adoption. It is first to be noted that prior to the Constitution and the statutes enacted pursuant to it, an American author had no rights in his literary work after publication. Under the common law, as recognized in this country an author who published his work dedicated it to the public. His rights were not comparable to those of the owner of real property or tangible personal property who was accorded a perpetual and exclusive right of future use. An author could have redress for theft of his manuscript, but his intellectual creation—once published—could be freely copied and disseminated. In *Wheaton v. Peters*, 8 Pet. 591, 663, this Court said that a perpetual and exclusive right of future publication "does not exist at common law." Speaking of the Copyright Act, the court said,

> "Congress, then, by this act, instead of sanctioning an existing right, as contended for, created it. This seems to be the clear import of the law, connected with the circumstances under which it was enacted." 8 Pet. at 661 (p. 661).

This Court has again and again reaffirmed its statement of the status of the law prior to the Constitution and the Copyright Act of 1790. In *Banks v. Manchester*, 128 U. S. 244, 252, the Court said, "A copyright cannot be sustained as a right existing at common law." More recently,

in *Mazer v. Stein*, 347 U. S. 201, 214-15, the Court said, "Congress may after publication protect by copyright any writing of an author. Its statutes create the copyright. It did not exist at common law even though he had a property right in his unpublished work."*

The first drafts of the Constitution contained no copyright provision** but resolutions urging such a provision were soon introduced. James Madison proposed that Congress be given power "To secure to literary authors their copy rights for a limited time" and further "To encourage by premiums & provisions, the advancement of useful knowledge and discoveries."*** The proposal was referred to a Committee whose proceedings are not reported.

On September 5, 1787, the Committee reported back to the Constitutional Convention and recommended passage

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*To the same effect see American Tobacco Co. v. Werckmeister, 207 U. S. 284, 291; Caliga v. Inter Ocean Newspaper Co., 215 U. S. 182, 188; Fox Film Corp. v. Doyal, 286 U. S. 106, 127. But see the dictum of Mr. Justice Brown in Holmes v. Hurst, 174 U. S. 82, 85.

**Journal, Acts and Proceedings of the Convention, 67-71 (1819).

***Madison, Debates in the Federal Convention of 1787 at 420 (Hunt and Scott ed. 1920); Journal, Acts and Proceedings of the Convention 260 (1819). Madison's resolution probably stems from a report to the Continental Congress by a Committee, of which he was a member, which declared that copyright protection "would greatly tend to encourage genius, to promote useful discoveries and to the general extension of arts and commerce." 24 Journals, Continental Congress 326 (1783). The Continental Congress recommended that the states pass copyright acts, and twelve of them did so. These statutes almost without exception emphasize the same purpose as the copyright clause ultimately embodied in the Constitution. See U. S. Copr. Off., Copyright Laws of the United States 1783-1952 (1953).

of the copyright clause in its present form.* The clause was adopted by the Convention without discussion. However, although illuminating debate is not available, we do know that the Convention deliberately chose a clause which emphasized that the purpose of copyright protection is to encourage and promote intellectual production and thus to benefit the public.**

In The Federalist only a paragraph is devoted to the copyright clause, probably owing to its non-controversial nature. However, in that brief treatment Madison stresses that in the copyright clause the "public good" fully coincides with the claims of individuals."***

Opinions of this Court have uniformly recognized the Constitutional purpose of promoting intellectual progress for the general welfare. Mr. Justice Jackson, speaking of the federal patent system, which is premised on the same clause of the Constitution, declared that its primary purpose "is not reward of the individual but the advancement of the arts and sciences. Its inducement is directed to disclosure of advances in knowledge which will be beneficial to society; it is not a certificate of merit, but an incentive to disclosure." *Sinclair & Carroll*

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*Journal, Acts and Proceedings of the Convention 327-329 (1819).

**Evans, Copyrgiht and the Public Interest 10 (1949), states that "the draftsmen of the copyright clause of the federal constitution had before them more than one philosophic basis for the exercise of Congressional authority in this field and . . . the choice made was deliberate . . . Whatever may be the basis of other national systems of copyright, in the United States the test both of the scope of legislative power and its application to any particular domestic situation is clearly that of the public interest . . ."

***The Federalist No. 43, at 278 (Modern Library ed. 1937).

Co. v. Interchemical Corp., 325 U. S. 327, 330-31. The copyright law, the Court has emphasized, "makes reward to the owner a secondary consideration." *United States v. Paramount Pictures*, 334 U. S. 131, 158; *Mazer v. Stein*, 347 U. S. 201, 219. Mr. Chief Justice Hughes, speaking for the Court in *Fox Film Corp. v. Doyal*, 286 U. S. 123, 127, pointed out that the "primary object" of conferring copyrights lies in "the general benefits derived by the public from the labors of authors." The rights, he declared, are "at once the equivalent given by the public for benefits bestowed by the genius and meditations and skill of individuals and the incentive to further efforts for the same important objects".

Nowhere, we think, have the fundamental principles which govern this case been better summarized than in the Committee Reports accompanying the Copyright Act of 1909, the last major revision of the laws. Those reports state:

> ". . . It will be seen, therefore, that the spirit of any act which Congress is authorized to pass must be one which will promote the progress of science and the useful arts, and unless it is designed to accomplish this result and is believed, in fact, to accomplish this result, it would be beyond the power of Congress.
>
> "The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, for the Supreme Court has held that such rights as he has are purely statutory rights, but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writ-

ings. The Constitution does not establish copyrights, but provides that Congress shall have the power to grant such rights if it thinks best. Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given. Not that any particular class of citizens, however worthy, may benefit, but because the policy is believed to be for the benefit of the great body of people, in that it will stimulate writing and invention, to give some bonus to authors and inventors.

In enacting a copyright law Congress must consider, as has been already stated, *two questions: First, how much will the legislation stimulate the producer and so benefit the public; and, second, how much will the monopoly granted be detrimental to the public?*"* H. Rep. No. 2222, 60th Cong. 2d Sess. (1909). Sen. Rep. No. 1108, 60th Cong., 2d Sess. (1909).

B. Consistent With the Primary Purpose of the Copyright Clause, Authors, in Creating New Works, Are Entitled to Make "Fair Use" of the Works of Other Authors.

1. A Copyright Is Limited in Accordance With the Constitutional Purpose of Stimulating the Art of Writing for the Benefit of the Public.

At the core of copyright law is the principle that the author's right in his copyrighted work is limited in accordance with the Constitutional purpose of copyright. Since copyright protection is granted under the Constitution in order to stimulate the art of writing for the benefit of the public, the rights granted to authors are limited to those which serve that purpose. If the grant of monopoly went beyond that reasonably necessary to promote the progress of science and the useful arts "it

*Italics added throughout, unless otherwise noted.

would be void", as pointed out by Judge Frank in *Chamberlin v. Uris Sales Corporation*, 150 F. 2d 512 (2d Cir., 1945), for, as was stated in *Martinetti v. Maguire*, 16 Fed. Cas. No. 9173 at 922 (C. C. D. Calif. 1867), "Congress is not empowered by the constitution to pass laws for the protection or benefit of authors and inventors, except as a means of promoting the progress of 'science and useful arts.'"

Where the Constitution expressly or impliedly declares the purpose for which legislation may be passed, statutes enacted pursuant to such delegation of power should be so construed as to be appropriate to that purpose. As this Court said in *Phelps v. United States*, 274 U. S. 341, 344:

> "Acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution".

Reward to the author and inventor is imperative to encourage writing and invention. But where the reward is in the nature of a monopoly, as it is here, it must not be so extended as to defeat the very purpose of the grant. As the Court of Appeals for the District of Columbia Circuit has said in reference to inventions in *Monsanto Chemical Co. v. Coe*, 145 F. 2d 18, 20 (1944):

> "It is the duty of the Patent Office and of the courts, to see to it that the reward is not in fact so large as to violate the constitutional mandate by discouraging invention by others and thereby impeding the progress of science and the useful arts. Const. art. §8, cl. 8. Whether or not a patent will have that effect is not a theoretical inquiry; it is a highly practical one."

In order to achieve the constitutional purpose it is not sufficient that the copyright monopoly be limited only in time; it must likewise be limited in scope. If an author were to be granted the right to prevent all use of his work by others, future intellectual creation would be stifled and the public interest injured.

For that reason and regardless of the broad language of the Act the courts have never construed it as according to a copyright owner an absolute monopoly over the contents of his work. Rather, the Act has consistently been construed as granting an author rights which are strictly limited. The scope of his rights is subject to limitations falling generally into one of two equally established legal doctrines:

(1) The author is not granted the right to prevent others from using elements contained in his work which are denominated by the courts as "unprotectible". Such unprotectible material, though it may be the product solely of original, laborious and even brilliant thought on the part of the copyright owner, is nevertheless free for use by anyone else in any manner and for any purpose.

(2) The author is not granted the right to prevent others from making *certain* uses of his *protectible* material, depending upon the nature of the use which is made. This is the judicially established doctrine of "fair use".*

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*Justice Story's term "justifiable use" (Folsom v. Marsh, 9 Fed. Cas. No. 4901; at 348, (C.C. D. Mass. 1841) is certainly preferable, but "fair use" is now established by the cases as the accepted terminology.

Although these two doctrines are distinguishable by reason of the difference in the nature of the material used,* the basis for each of them is identical—the requirements of the Constitutional mandate that make paramount the promotion of science and the useful arts, with the consequent benefit to the public.

Thus with respect to the first doctrine, that of unprotectibility, an author is not granted the right to prevent others from copying or using the ideas or intellectual concepts contained in his works; no matter how novel, clever or original they may be. These elements are unprotectible. See *Holmes v. Hurst,* 174 U. S. 82; *Baker v. Selden,* 101 U. S. 101-2, per Bradley, J. Ideas are "free as air;" they are available to all authors to develop in such ways as their imaginativeness and inventiveness may make possible.** Copyright protectibility thus does not create a monopoly which is unlimited in scope, since, as stated by Judge Learned Hand, "otherwise the playwright could prevent the use of his 'ideas' to which, apart from their expression, his property is never extended."***

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*Some courts, especially the Second Circuit, have sometimes utilized the term "fair use" for both doctrines above referred to, and have thus included within the scope of the term the right to use unprotectible material. See e. g. Sheldon v. Metro-Goldwyn Pictures Corp., 81 F. 2d 49, 54 (2d Cir., 1936). It would appear to be less confusing and more in accord with the majority of the cases to confine the terminology of "fair use" to the use of copyrighted material which, except for the application of the principle, would constitute an infringement.

**Mr. Justice Brandeis, dissenting in International News Service v. Associated Press, 248 U. S. 215, at 250; London v. Biograph Co., 231 Fed. 696 (2d Cir. 1916); Shipman v. RKO Radio Pictures, Inc., 100 F. 2d 533 (2d Cir. 1938); Groppet v. Warner Bros. Pictures, Inc., 38 F. Supp. 329 (S. C. N. Y. 1941); Solomon v. RKO Radio Pictures, Inc., 44 F. Supp. 780 (S. D. N. Y. 1942).

***Nichols v. Universal Pictures Corp., 45 F. 2d 119, 121 (2d Cir. 1930).

Similarly, the theme,* situation,** and background*** are not protectible.

The reason the prohibition against copying contained in the Act does not extend to such matters is stated in *Eichel v. Marcin*, 241 Fed. 404, 408 (S. D. N. Y. 1913):

> "The object of copyright is to promote science and the useful arts. If an author, by originating a new arrangement and form of expression of certain ideas or conceptions, could withdraw these ideas or conceptions from the stock of materials to be used by other authors, each copyright would narrow the field of thought open for development and exploitation, and science, poetry, narrative, and dramatic fiction and other branches of literature would be hindered by copyright, instead of being promoted."

To extend the copyright monopoly to cover such unprotectible property would be to reward the author at the expense of the public; the statute will not be so construed.

The doctrine that the copyright monopoly never extends to "unprotectible" material was clearly recognized by the District Court in the instant case [R. 232] and is well established in decisions of the Court of Appeals

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*Shipman v. RKO Radio Pictures, Inc., 100 F. 2d 533 (2d Cir. 1938); Gropper v. Warner Bros. Pictures, Inc., 38 F. Supp. 329 (S. D. N. Y. 1941); Roe-Lawton v. Hal E. Roach Studios, 18 F. 2d 126 (S. D. Cal. 1927); Solomon v. RKO Radio Pictures, Inc., 44 F. Supp. 780 (S. D. N. Y. 1942).

**Dezendorf v. Twentieth Century-Fox Film Corp., 32 F. Supp. 359 (S. D. Cal. 1940) *aff'd.* 118 F. 2d 561 (9th Cir. 1941); Echevarria v. Warner Bros. Pictures, Inc., 12 F. Supp. 632 (S. D. Cal. 1935); Wiren v. Shubert Theatre Corp., 5 F. Supp. 358 (S. D. N. Y. 1933), *aff'd.* 70 F. 2d 1023 (2d Cir. 1934).

***Nichols v. Universal Pictures Corp., 45 F. 2d 119 (2d Cir. 1930).

for the Ninth Circuit. *Harold Lloyd Corp v. Witwer*, 65 F. 2d 1 (9th Cir. 1933); *Kustoff v. Chaplin*, 120 F. 2d 551 (9th Cir. 1941). The fundamental error in the decisions below lies in the failure to recognize that the same basic principle which applies to that doctrine applies equally to the doctrine of "fair use," *i. e.*, that the copyright holder's monopoly is limited by the paramount interest of the public in having the art of writing encouraged, and that therefore it does not encompass the right to prohibit such uses of "protectible" property as are themselves necessary or important to such encouragement.

2. An Author's Copyright Does Not Enable Him to Prevent Others From Making a "Fair Use" of His Copyrighted Work in Their New Creations.

Courts in the United States have firmly established the principle of "fair use"—the principle that under some circumstances and for some purposes, uses may freely be made of protectible material, even though use of the same material under other circumstances and for other purposes would be an infringement of the copyright. This principle is, as we have pointed out, but a reflection of the fact that the primary purpose of the copyright clause of the Constitution is to promote the progress of science and the useful arts for the benefit of the public. Thus, in *Mathews Conveyer Co. v. Palmer-Bee Co.*, 135 F. 2d 73, 85 (6th Cir. 1943), the court pointed out that "fair use" of copyrighted material is "based upon the principle that subsequent workers in the same field are not deprived of all use thereof, as otherwise, the progress of science and the useful arts would be unduly obstructed."

As stated by Leon L. Yankwich, Chief Judge of the United States District Court for the Southern District of California, in an article entitled *Parody and Burlesque*

in the Law of Copyright, 33 Can. Bar Rev. 1130, 1152 (1955):

> "'Fair use' was evolved as a concept by the courts in the English-speaking world with a view to aiding the development of science and arts by allowing use of copyrighted materials despite the monopoly of copyright."

The rationale of the principle underlying the limitations on copyright exclusivity, and hence the doctrine of fair use, was epitomized by Professor Chafee as follows:

> "Nobody else should *market* the author's book, but we refuse to say nobody else should *use* it. The world goes ahead because each of us builds on the work of our predecessors. 'A dwarf standing on the shoulders of a giant can see farther than the giant himself.' Progress would be stifled if the author had a complete monopoly of everything in his book for fifty-six years or any other long period. Some use of its contents must be permitted in connection with the independent creation of other authors. The very policy which leads the law to encourage his creativeness also justifies it in facilitating the creativeness of others." (Chafee, *Reflections on the Law of Copyright*, 45 Col. L. Rev. 503, 511 (1945) (Prof. Chafee's emphasis).

A widely recognized "fair use" of a copyrighted work —and a use closely analogous to parody and burlesque— is that made in literary criticism. In an early case, Mr. Justice Story, sitting as Circuit Justice, said:

> ". . . no one can doubt that a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for

> the purposes of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the most important parts of the work, with a view, not to criticize, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy." *Folsom v. Marsh*, 9 Fed. Cas. No. 4901 at 344 (C. C. D. Mass. 1841).

The opinion of Mr. Justice Clifford, sitting as Circuit Justice in *Lawrence v. Dana*, 15 Fed. Cas. No. 8136 at 61 (C. C. D. Mass. 1869), refers to the "privilege of a subsequent writer to make what is called a fair use of a prior publication" and emphasizes a critic's right to make substantial extracts from a copyrighted work:

> "Reviewers may make extracts sufficient to show the merits or demerits of the work, but they cannot so exercise the privilege as to supersede the original book. Sufficient may be taken to give a correct view of the whole; but the privilege of making extracts is limited to those objects, and cannot be exercised to such an extent that the review shall become a substitute for the book reviewed. . . ."

Farmer v. Elstner, 33 Fed. 494, 496 (C. C. E. D. Mich. 1888), likewise asserts a reviewer's broad right to make extracts for the purposes of criticism "so long as such extracts are not made as a cover for a republication." See also *Hill v. Whalen & Martell, Inc.*, 220 Fed. 359, 360 (S. D. N. Y. 1914).*

A characteristic application of the principle of fair use enables authors of learned or technical works to use the copyrighted material from books on the same subject.

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*In West Pub. Co. v. Edward Thompson Co., 176 Fed. 833, 838 (2d Cir. 1910), the court said that reprinting one or more copyrighted poems in a textbook on literature would be a fair use.

In *Simms v. Stanton*, 75 Fed. 6 (C. C. N. D. Cal. 1896), the court held "fair" the use in a book on physiognomy of a large quantity of material, including the topical divisions, from a prior book on the subject. Similarly, it was held "fair use" for the authors of law textbooks to make use of lists of citations contained in an earlier law encyclopedia. *Edward Thompson Co. v. American Law Book Co.*, 122 Fed. 922 (2d Cir., 1903).* Akin to this decision is the holding that there was no infringement where portions of a book of forms copyrighted by the American Institute of Architects were copied by an architect and distributed to his clients. *American Institute of Architects v. Fenichel*, 41 Fed. Supp. 146 (S. D. N. Y. 1941).

The use of copyrighted material for purposes of illustration is another important application of the principle of fair use. It was held a "fair use" for the New Yorker Magazine, in a "Talk of the Town" piece marking the death of Pearl White, to quote 13 lines from a song associated with Miss White's role in the "Perils of Pauline." *Broadway Music Corp. v. F-R Pub. Corp.*, 31 Fed. Supp. 817 (S. D. N. Y. 1940).* Similarly, quota-

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*The court emphasized that ". . . If it be held that an author cannot consult the authorities collected by his predecessors, the law of copyright, enacted to promote the progress of science and useful arts, will retard that progress." 122 Fed. at 923.

*The New Yorker piece read:

"The death of Pearl White in Paris made us think of a song everybody sang when we were thirteen and 'The Perils of Pauline' was being shown every week at the Nemo Theater, on Broadway and 110th Street. As nearly as we can remember it, the chorus went: [thirteen lines of the chorus were printed] We forget the rest. As 1940 creeps on, it often seems to us

tion in a Saturday Evening Post article of the lyrics of a song written for the Green Bay Packers football team was a "fair use." *Karll v. Curtis Pub. Co.*, 39 Fed. Supp. 836 (E. D. Wis. 1941). Again, the use in a J. P. McEvoy story in Colliers of ten lines of a copyrighted song in the form of what characters in the story hear over the radio is a "fair use." *Shapiro, Bernstein & Co. v. P. F. Collier & Son*, 26 U. S. P. Q. 40 (S. D. N. Y. 1934).

Early English law also accorded recognition to the principle of "fair use." In 1802, Lord Ellenborough enunciated the principle in *Cary v. Kearsley*, 170 Eng. Rep. 679, 680:

> "That part of the work of one author is found in another, is not of itself piracy, or sufficient to support an action: a man may fairly adopt part of the work of another; he may so make use of another's labours for the promotion of science, and the benefit of the public: but having done so, the question will be, Was the matter so taken used fairly with that view, and without what I may term the *animus furandi?* . . ."

In *Bell v. Whitehead*, 8 L. J. 141 (1839), Lord Cottenham held that, for purposes of criticism, the Railway Times could print a substantial extract from a copyrighted article by Dr. Lardner which appeared in the Monthly

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that we have forgotten practically everything of any importance." 31 Fed. at 818.

The public interest is indicated by the court's statement:

> "True the defendant could very well have commented on the passing of Pearl White without any use of this song, and no doubt reference to the song made the article more attractive, but the whole news article, with the song included, was nothing more than an epitaph for the dead actress, an epitaph that would be recalled by thousands of Americans." *Ibid.*

Chronicle on the velocity attainable on railways.* Similarly, in *Sayre v. Moore,* quoted in *Cary v. Longman,* 102 Eng. Rep. 138, 139 n. (1801), Lord Mansfield held that a publisher of a chart could "take advantage of all prior publications" so long as the chart he produces is not a "servile imitation."

Respondents have heretofore contended that the right of fair use is dependent upon the implied consent of the author or the copyright proprietor. A moment's reflection will dispel that notion. If that were so, then any author could prevent or limit any quotation or other use of his work for purposes of exemplification, criticism, review or otherwise, by a simple "notice of non-consent". But the right to make such a use exists even though the criticism or review is highly unfavorable.** *Hill v. Whalen & Martell, Inc.,* 220 Fed. 359 (S. D. N. Y. 1914); See Spring, *Risks and Rights* 180 (1952). The fact is that this author simply never acquires the right to prevent the use of his work as a basis for a critical review.

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*The opinion states:

". . . This extract was clearly inserted for the purpose of criticism. The defendants publish the observations of Dr. Lardner, and also comments thereon, and that was the course followed in *Whittingham v. Wooler*, where the decision was in favour of such extracts being allowed to be made: large extracts, moreover, from works, are constantly given in the *Edinburgh* and *Quarterly Reviews*, not for the purpose of rendering it unnecesary for the public to purchase the works reviewed by those periodicals, or of superseding the works themselves, but of explaining their criticisms on the works." 8 L. J. at 142.

**"A criticism of the original work, which lessened its money value by showing that it was not worth seeing or hearing, could not give any right of action for infringement of copyright." 220 Fed. at 360.

The wide diversity in the "fair use" cases set forth above* shows the inaccuracy of the Court of Appeals' suggestion that fair use is limited to "compilations, listings, digests and the like" [R. 282]. Indeed, the types of fair use are so varied that no one definition fits them all. However, the unifying element is the Constitution which requires that the copyright monopoly leave ample room for the dissemination of knowledge and the promotion of the useful arts. Under this mandate, it is submitted that the principle of fair use is as broad as the public interest in encouraging creativeness.

C. An Author of a Burlesque or Parody Is Entitled to Use Copyrighted Works in Accordance With the Principles of Fair Use.

The court below held that "parodized or burlesque taking is to be treated no differently from any other appropriation," announcing flatly that a burlesque presentation is "no defense to an action for infringement of copyright" [R. 284]. The court thus refused to recognize that the author of a burlesque or parody has a right to make a "fair use" of copyrighted material, stating that "up to the time of the present controversy, no federal court, in any adjudication, has supposed that there was a doctrine of fair use" applicable to parody or burlesque [R. 283]. This failure to apply the principles which are basic to copyright, and have generated the doctrine of fair use is the fundamental error of the decision below. Such a result, as we shall show, ignores the nature of

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*An exhaustive collection of American cases on "fair use" may be found in Cohen, *Fair Use in the Law of Copyright* 6 ASCAP Copyright Law Symposium 43 (1955).

parody and burlesque and completely overlooks the primary purpose of the copyright clause of the Constitution.

1. Parody and Burlesque Constitute a Useful and Significant Art.

It is clear that the literary art form of parody and burlesque is a "useful art" within the meaning of the Constitution. It has a history going back to the dawn of literature and is a recognized and respected form of Greek writing and drama [R. 116-117]. With the invention of printing and the subsequent advent of the novel and resurgence of the drama it was revivified and revitalized.* Such important figures in literature as Fielding, Thackeray, Jane Austin, Bret Harte and James M. Barrie were all active in this field.

It is inherent in the nature of burlesque and parody that they constitute a form of criticism. Dr. Frank C. Baxter of the English Department of the University of Southern California so testified at the trial [R. 144-145]. Kitchin's "Survey of Burlesque and Parody in English" (Oliver & Boyd ed. 1931), declares (p. 9) that burlesque is "a long-established mode of criticism, which is often far more incisive, and certainly more economical than the heavy review to which the public has been accustomed since the days of Dryden". Aldous Huxley

*Hamilton's six volume collection of "Parodies of the Works of English and American Authors," published in 1885, contains several thousand parodies, most of them poetic. Shepherson's "Novel in Motley" contains a list of over 100 parodies or burlesques of 19th Century novels.

in "Point Counterpoint" says "Parodies and caricatures are the most penetrating of criticisms" (Chap. 28). Professor Robert Falk in "American Literature in Parody" (1955) (p. 13) states that "Parody is both a form of literary humor and a branch of criticism".

Burlesque and parody play the critic by inviting comparison and inducing appraisal. The original which is solemn or banal or vulgar may be more effectively brought to book by a parody or burlesque which gives the events in the original a gentle but decisive push to absurdity. There was, for example, no more incisive criticism of Joan Lowell's "Cradle of the Deep" than Corey Ford's "Salt Water Taffy" (App. p. 21). Nor could the unconscious hypocrisy of Samuel Richardson's "Pamela" have been more acutely exposed than by Sir Henry Fielding's "Shamela" (App. p. 50). Even where criticism is not a paramount purpose, the result of a good parody or burlesque is to cause the thoughtful audience to make some challenge of its pre-existing judgments upon the original.

The fact that it is written to amuse does not at all lessen the importance or usefulness of this art form. *Cf. Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495, 501. "What is one man's amusement, teaches another's doctrine." *Winters v. New York*, 333 U. S. 507, 510. *Cf. Hannegan v. Esquire, Inc.*, 327 U. S. 146; *Bleistein v. Donaldson Lithographing Co.*, 188 U. S. 239. The world would be a poorer place were it to be deprived of the delightful poems in Louis Carroll's "Alice in Wonderland", most

of which are extremely close parodies.* In times when freedom of expression is threatened by widely divergent pressures, the ancient arts of parody and burlesque are well worth preserving.

2. Use of a Pre-existing Work Is Indispensable to Parody or Burlesque.

To exist, parody and burlesque must have one essential prerequisite: Like literary criticism, they must use a pre-existing work. In this respect they differ from other forms of art such as the general fields of poetry, novel or drama. The copyright owner has the exclusive right to dramatize his novel or to translate it into a radio play, television play or musical comedy, because such protection does not interfere with the public interest. The prohibition against another author's using any particular book or play for such translation does not substantially narrow the field of intellectual creation; such other author can draw upon his own imagination to create his own novel or play. By definition, however, he cannot create a parody or burlesque of a particular work unless he does use particular recognizable elements of the work burlesqued. Such use is an absolute requisite if the art is to survive.

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*The familiar "You are old, father William" is a comic facsimile of poet laureate Robert Southey's highly moral poem, "The Old Man's Comforts, and How He Gained Them." Southey's poem consists of three inquiries by a young man to his pious father, each answered by sage examples. The first and each alternate verse begin "'You are old, father William,' the young man cried," and each answering verse begins "'In the days of my youth,' father William replied." Carroll used not only the "plot," the thought, the form, and the style of the original, but actually many of the very words. Had any other serious poet used as much of Southey's poem for a similar poem, we think there could have been no question but that it would be a "substantial taking" under the rule applied here by the lower courts.

This does not mean that the parodist is a plagiarist. The differences are marked and vital.

In the first place, the plagiarist takes material from the original *in order to adopt it as his own.* He may make subtle changes and additions to hide his theft, but his intent is to claim as his the finished product in its entirety. He thus acts, consciously or subconsciously, *animo furandi.*

The parodist, on the other hand, emphasizes and re-emphasizes that the facets of the original which he has selected and used for the purpose of parodying them are *not* his own. He calls attention in every conceivable way to the fact that those facets are the concepts of the author who is his target—by reminiscent title or character names, by the use of the same basic incidents and sequence of incidents, by broad imitation of style and mannerisms, and by any other available device. That is the very essence of his art. He wants and expects his audience to be somewhat familiar with the original, and he uses every means to recall to their minds its content, and then proceeds by his originality and ability to show what can be done with that recalled image to cause the audience itself mentally to transform the original mood and effect into something new and different. Thus, the parodist or burlesquer in fact "takes" nothing; he *uses* the original solely as the acknowledged and necessary ingredient to create his own unique and wholly different art form.

Furthermore, the plagiarist purveys to his audience the values of the original as such. Artfully or inartfully disguised, he palms them off; thus, to that extent he supersedes the original and robs its author of his reward.

Their usefulness for this purpose is the reason for his selecting them. The parodist never purports to purvey the values of the original as his values. On the contrary, the values he creates are diametrically different values. They arise not at all from what he uses, but with what he does with what he uses. They neither substitute for nor supersede the original; if they do, then the parodist has become a plagiarist.

3. The Test for Infringement Adopted Below Would Stifle Parody and Burlesque.

The courts below applied the same test to the parodist as is customarily applied to the plagiarist, *i. e.*, that of determining nothing more than whether what was taken was "substantial", declaring that "if it is determined that there was a substantial taking, infringement exists" [R. 252, 284]. There can be no doubt but that this correctly states the established test for literary plagiarism. *Dymow v. Bolton*, 11 F. 2d 690 (2d Cir. 1926); *Caruthers v. R.K.O. Radio Pictures*, 20 Fed. Supp. 906 (S. D. N. Y. 1937).

Such a rule is highly restrictive, as it ought to be where the gravamen of the charge is that one author has deliberately plagiarized the work of another. Under it "copying" is the basis of infringement. The standard regularly applied by courts in the ordinary plagiarism case is whether the allegedly offending work is "recognizable by an ordinary observer as having been taken from the copyrighted source." *Fleischer Studios, Inc. v. Ralph A. Freundlich, Inc.*, 73 F. 2d 276, 278 (2d Cir. 1934), *cert. den.* 294 U. S. 717; *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F. 2d 354, 361 (9th Cir. 1947); *Kustoff v. Chaplin*, 120 F. 2d 551, 560 (9th Cir. 1941).

Furthermore, under the rule applicable to ordinary plagiarism and adopted below, the "substantiality" of the taking is measured practically by *de minimis* standards. "Its unauthorized appropriation is not to be neutralized on the plea that 'it is such a little one'". *Chicago Record-Herald Co. v. Tribune Assn.*, 275 Fed. 797, 799 (7th Cir. 1921). In the *Universal Pictures Co.* case, the court held that the use of one sequence of a motion picture is an infringement. 162 F. 2d at 360. In *Daly v. Palmer*, 6 Fed. Cas. No. 3552 (C. C. S. D. N. Y., 1868), *affirmed sub. nom. Brady v. Daly*, 83 Fed. 1007 (2d Cir. 1897), the plagiaristic use of one incident taken from the end of the third scene of the fourth act of a play was held actionable.* In *Chappell & Co. v. Fields*, 210 Fed. 864 (2d Cir. 1914), the portion plagiarized also consisted of only one short scene from one act of a play, the balance of the play being entirely different. In *De Acosta v. Brown*, 146 F. 2d 408 (2d Cir. 1944), a biography of Clara Barton was held to infringe another on the same subject because a fictitious early romance appears in both. The court said that, "The fact that the matter involved concerned only a small and an early part of Clara Barton's life and only a portion of defendant Brown's book may affect the amount of recovery, but does not prevent liability". *Id.*, at 410. Similarly, infringement has been found where what was used was only a "small part" of a book, amounting to 300 or 400 words (*Warren v. White & Wyckoff Mfg. Co.*, 39 F. 2d 922 (S. D. N. Y. 1930), or only three sentences (*Henry Holt*

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*This incident was the now familiar but then novel one which placed the heroine, bound and tied by the villain, upon the track of a railroad from which she is rescued in the nick of time by the hero.

& Co. v. Liggett & Myers Tobacco Co., 23 Fed. Supp. 302 (E. D. Pa. 1938)).

Many of the famous parodies and burlesques of literature would certainly have been held to infringe under the plagiarism test of "substantial" taking. To be effective a parody or burlesque *must* be "recognizable by an ordinary observer as having been taken from the copyrighted source."* As a consequence the parodist ordinarily must use "substantial" material from the original, as that term is used in the plagiarism cases. "Shamela" was an "outline of the important scenes and incidents in Pamela" in which only "a few of the facts" were changed.** Bret Harte used the entire plot of Anthony

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*This is not a requirement imposed by some abstruse scholar. About a year after Poe's "The Raven" was first published, a country lawyer in Springfield, Illinois, received a parody of that poem from a friend. He replied in part:

"April 18, 1846

"Friend Johnston:

"Your letter, written some six weeks ago, was received in due course, and also the paper with the parody. It is true, as suggested it might be, that I have never seen Poe's 'Raven,' and I very well know that a parody is almost entirely dependent for its interest upon the reader's acquaintance with the original. . . .

"Yours truly,
A. Lincoln"

The Living Lincoln 86 (Angle & Miers ed. 1955).

**Shepperson, "The Novel in Motley; A History of the Burlesque Novel in English 23 (1936). Sheridan W. Baker's preface to an edition of "Shamela" published in 1953 states:

"Even where Fielding seems to be extemporizing most freely in his own vein he is following Richardson. . . . Fielding reduces Richardson's two volumes to half a hundred pages, pinning scenes together with details from here and there (examine Shamela's relationship with Mrs. Jewkes), and yet following Richardson's contours exactly. Few parodies—in verse or prose—can come near *Shamela* in its sustained and persistent mimicry." ("An Apology for the Life of Mrs. Shamela Andrews," pp. xxxi-xxxii (Baker ed. 1953).)

Hope's "The Prisoner of Zenda", all its principal characters, and practically all its important incidents in his delightful burlesque, "Rupert the Resembler." Thackeray did the same with Dumas' "Otho the Archer." The entire story line and even much of the dialogue of Augustus Thomas' melodramatic play "Arizona" was used as the basis of the burlesque by Edgar Smith which was performed on Broadway by Weber and Fields less than two months after the original play opened. Corey Ford's "Salt Water Taffy: Or, Twenty Thousand Leagues Away From the Sea" lampooned Joan Lowell's "Cradle of the Deep" chapter by chapter and incident by incident [see Appendix; also Exs. 12, 13, 16, 17].

The suggestion of the District Court [R. 256] that parody and burlesque can thrive on material in the public domain or material to whose use the copyright holder may consent seems shallow. Limitation to public domain material would rob parodies and burlesques of the freshness and timeliness which is the key to their effectiveness and it would deprive the public of this type of critique of current originals. If Cornelia Otis Skinner had been required to wait for the expiration of the copyright to Ernest Hemingway's "For Whom the Bell Tolls," it is likely that her delightful parody titled "For Whom the Gong Sounds" (App. p. 12) would never have been written. With respect to "consented" material, there is no need to labor the point that, human nature being what it is, authors whose works most need the pin prick of parody would be the least likely to consent.

4. The Principles of Fair Use Should Be Applicable to Parody and Burlesque.

To uphold the rule adopted by the courts below would violate the primary purpose of the copyright clause of

the Constitution. As we have shown, parody and burlesque constitute useful arts whose preservation is in the public interest. The Constitution requires that the copyright laws be interpreted so as to facilitate and encourage such independent, useful arts. In short, the copyright laws must be interpreted so as to permit authors to use copyrighted works to the full extent necessary to create valid parodies and burlesques of such works.

The cases cited at pages 21-27 *supra* establish that, where it is necessary or highly desirable to make certain substantial uses of protectible copyrighted material in order to promote the progress of science and the useful arts, such uses may be made under the doctrine of "fair use." Especially relevant are the literary criticism cases (pp. 22-23; 25-26 *supra*) where the courts have recognized that reviewers and critics must make a substantial use of the original in order to perform their important function. Similarly the Court here should recognize that it is essential that the authors of parodies and burlesque be permitted to make a fair use of copyrighted works in performing their important function and in creating their independent works. "A different approach would limit not only creation, but the very development of literature, arts and sciences". Yankwich, Parody and Burlesque in the Law of Copyright, 33 Can. Bar Rev. 1130, 1132 (1955).*

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*"Because from the very inception of literary history . . . parody and burlesque have been recognized as independent intellectual creations, we should not destroy them through judicial fiat by applying to them tests which fail to take into account this historical fact. Rather should we encourage those endowed with and practising the comic spirit to continue, in the words of Joseph Addison, to draw persons or characters 'quite unlike themselves.'" (*Id.* at 1154.)

A number of factors unite to show that the principle of fair use, rather than the rules applicable to ordinary literary plagiarism, should be applicable to parody and burlesque. Although some of these factors are referred to elsewhere in the brief, it is appropriate to summarize them here:

(a) A parody or burlesque is a "new thing", a new intellectual creation in a wholly different *genre*, ordinarily requiring for its production talents and skills quite unrelated to those possessed by the author of the original.

(b) The use of a copyrighted work is essential, in the nature of things, for the creation of a parody or burlesque of that work.

(c) A parody or burlesque both entertains and amounts to a critique, and there is a strong public interest in preserving and encouraging this useful art.

(d) Parody and burlesque are a well-established tradition and all interested persons have acquiesced in the custom for centuries.

(e) The plagiarist tries in every way to disguise the fact that he has stolen from another author, but the whole purpose of the author of a parody or burlesque is to impress upon his audience the fact that he has used the original, and that whatever of the original may appear in his work is by no means to be confused with what he himself has created.

(f) The purpose of the plagiarist is to enhance the value of his work (to get a "free ride") through the use of the creative values contained in the work

> from which he steals. The parodist, on the other hand, discards the intrinsic values of the original by his very act of parodying; he relies on the fact that the original is well known, but he has no interest in appropriating, nor does he appropriate, its literary values.

It is no bar to the right of fair use that the burlesque or parody is produced for "commercial gain." We believe that the trial court demonstrably erred in placing so much weight on that factor [R. 236-240]. Like most literary criticism (which unquestionably has the right of fair use), burlesque and parodies of course are written for "commercial gain." They always have been. Even the Greeks contended for the crowns of laurel which meant financial success. As the Court of Appeals for the Ninth Circuit said in *Warner Bros. Pictures, Inc., v. Columbia Broadcasting System*, 216 F. 2d 945, 950 (195..), "Authors work for the love of their art no more than other professional people work in other lines of work for the love of it. There is the financial motive as well."*

The circumstance that television may be a potent competitor to motion pictures for the nation's entertainment audience does not affect the application to parody or burlesque of the principles of fair use. The same interest

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*A "commercial gain" test would make infringement depend wholly on the sale—even the salability—of the particular parody or burlesque rather than on its intendment, its nature or its content. A parody printed in the "Saturday Evening Post" for compensation would infringe; the same parody published by the author at his own expense and distributed without charge would not. This, despite the fact that the Copyright Act deliberately omits the "for profit" qualification as a requirement to establish infringement in the case of books, poems or plays [R. 236].

protects the right of the public to view these useful creations at home as protects its right to see them on the stage or to buy them at the book store. Certainly the advent of television did not have the effect of enlarging the author's monopoly under the Copyright Act so as to permit him to prohibit or control an art previously unfettered.*

There is also no merit in the suggestion below [R. 283] that a parody or burlesque is an "other version" which the copyright owner has an exclusive right to make under Section 1(b) of the Copyright Act. The words "other version" received their first construction in *Ricordi Co. v. Mason,* 201 Fed. 184 (S. D. N. Y. 1912), where the court held that a synopsis of a copyrighted opera in a book of synopses did not constitute an infringement. The court, in denying complaint's theory that such a synopsis was another version, said:

> "A literal definition of the words 'make any other version thereof' would not only include the defendant's publication, but also the newspaper publication, after performance, of any reviews or criticism, . . ." *Id.* at 185.

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*Burlesque and parody are distinguishable from the type of commercial use proscribed in Henry Holt & Co. v. Liggett & Myers Tobacco Co., 23 F. Supp. 302 (E. D. Pa. 1938). There, in a pamphlet advertising Chesterfield cigarettes, the tobacco company included a quotation from a copyrighted scientific treatise in a manner which made it appear that the author of the treatise had consented to the use of his work for advertising purposes. Its use by the tobacco company was not necessary to promote the progress of science or the useful arts as is the case when parody or burlesque uses the burlesqued or parodied work. No attempt was made to use the treatise as a springboard for creating something new in science or art. The use was simply an unauthorized copying of copyrighted material under circumstances and in a manner which afforded no justification for the use.

And the Court of Appeals, in affirming *per curiam,* said:

> "We are clearly of the opinion that these extremely brief epitomes of the plots of the two operas, . . . are neither of them in any true sense 'a version' of the copyrighted work, as that word is used in the statute." 210 Fed. 277 (2d Cir. 1913).

It seems clear that a parody or burlesque which is a new intellectual creation is not an "other version" as that phrase is used in the statute. See *Corcoran v. Montgomery Ward & Co., Inc.,* 121 F. 2d 572, 573 (9th Cir. 1941).

5. Application of the Principle of Fair Use to Burlesque and Parody Is Consistent With the Authorities.

While the issue presented in this case has never been the subject of a square decision by any court, the authorities which have discussed the problem support the application of the principle of fair use to parody and burlesque.

The English cases. In *Glyn v. Western Features Film Co., Ltd.,* 1 Ch. 261, 114 L. T. Rep. 354 (1916), the author of the somewhat notorious "Three Weeks," Eleanor Glyn, brought a copyright infringement action against the defendant who had produced a motion picture entitled "Pimple's Three Weeks (without the Option)," which included a burlesque of some of the incidents in the book. One of the defenses was that the film "is a mere burlesque of the plaintiff's novel, and that a genuine burlesque of a serious work constitutes no infringement of copyright". The case was decided upon the ground that the plaintiff's work was so immoral as not to be entitled to copyright protection, but the court referred to the burlesque defense as follows:

> "Making all allowance for the fact that prior to the Act of 1911 literary copyright did not include the acting right, it certainly is remarkable that no case can be found in the books in which a burlesque

even of a play has been treated as an infringement of copyright, although burlesque, frequently more distinguished than the thing burlesqued, is as old as Aristophanes, to take Mr. Hartree's example. It may well be that as far as English law is concerned one reason for this striking state of things is that the older cases insist upon the necessity of establishing that the alleged piracy is calculated to prejudice the sale or diminish the profits or supersede the objects of the original work, whereas it is well known that a burlesque is usually the best possible advertisement of the original and has often made famous a work which would otherwise have remained in obscurity. More probably, however, the reason is to be found involved in such observations as those of Lindley L. J. in *Hanfstaengl v. Empire Palace,** or in such a decision as that of the Court of Appeal in *Francis, Day & Hunter v. Feldman & Co.,*** or in the principle that no infringment of the plaintiff's rights takes place where a defendant has bestowed such mental labour upon what he has taken and has subjected it to such revision and alteration as to produce an original result. . . ." 1 Ch. (1916) at 268, 114 L. T. Rep. at 356.

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*In Hanfstaengl v. Empire Palace, Ltd., 70 L. T. Rep. N. S. 854 (1894), the defendant had printed drawings in its newspaper of living tableaux depicted on the stage of a theatre, which tableaux were in turn representations of copyrighted pictures. All the judges treated the case as if the drawings had been made directly from a view of the pictures themselves. Lindley, L. J., after pointing out that fair reviews of literary works may properly contain lengthy extracts from the original, held that the sketches did not constitute infringement because they were "rough sketches, made for a very different purpose and answering a very different purpose." *Id.* at 86.

**In Francis, Day & Hunter v. Feldman & Co., 2 Ch. 728, 83 L. J. 906 (1914), a parody (entitled, "You didn't want to do it—but you did") of "You Made Me Love You—I Didn't Want to Do It," was held not to infringe the copyrighted song, but the court did not discuss the question of parody as a fair use.

The other English case on burlesque is *Carlton v. Mortimer*, which apparently is reported only in MacGillivray, Copyright Cases, 1917-23 at 194 (1924). In that case, the owners of the dramatic rights in a book entitled "Tarzan of the Apes" claimed infringement by reason of a comic acrobatic performance under the title of "Warzan and his Apes," which used two incidents from the book. The court held (in MacGillivray's words):

> ". . . In the book both these features were serious, perhaps they might be described as sentimental. In the defendant's performance they were both comic to the last degree. They were intended to be comic and produce nothing but laughter. So far as these incidents might be said to be taken from the book, he was satisfied that they were a mere burlesque of these incidents. Without going to the extent to which he understood Mr. Justice Younger went into the case of *Glyn v. Western Feature Film Co.*, [1916] 1 Ch. 261, in saying that a burlesque never can be an infringement of copyright, he was of the opinion that the burlesquing of these two trifling incidents and the production of the performance under a title which was somewhat similar in sound to, but yet different in fact from, the title of the novel did not amount to an infringement of the plaintiff's rights. . . ." *Id.* at 195-6.

The American cases. Prior to the instant case, the only decision in the United States which involved burlesque or parody was *Hill v. Whalen & Martell, Inc.*, 220 Fed. 359 (S. D. N. Y. 1914). There the plaintiff was the exclusive licensee of the dramatic rights to the well known cartoon "Mutt and Jeff." Defendant produced a dramatic performance entitled "In Cartoonland" in which he introduced characters called "Nutt" and "Giff", who were

costumed exactly like the cartoon characters and whose actions and speech were in harmony with the spirit of the cartoons. It was as palpable a steal as could be imagined. See discussion of the case in *King Features Syndicate v. Fleischer*, 299 Fed. 533, 536 (2d Cir., 1924). Defendant in the *Hill* case had the temerity to claim his use was a "burlesque," perhaps referring to the type of theatre in which it was performed. The court properly denied his claim, emphasizing in its opinion that the defendant's characters Nutt and Giff would be a substitute for Mutt and Jeff:

> ". . . Those who saw 'Nutt' and 'Giff' would have less keen a desire to see 'Mutt' and 'Jeff'. . . . A good many of them would probably think that they had already seen those characters. They would not be far wrong in so thinking. . . ." 220 Fed. at 360.

The court, however, reaffirmed the general principle of fair use, as follows:

> "A copyrighted work is subject to fair criticism, serious or humorous. So far as is necessary to that end, quotations may be made from it, and it may be described by words, representations, pictures, or suggestions. . . ." *Ibid.*

The trial judge in the instant case discussed three early American cases involving mimicry by a performing actor [R. 241-243]. In *Bloom & Hamlin v. Nixon*, 125 Fed. 977 (E. D. Pa. 1903), the singing verbatim of the complete chorus of a popular song as a part of an imitation of another singer was held a fair use. The same decision was given in *Green v. Minzensheimer*, 177 Fed. 286 (S. D. N. Y. 1909), where one verse and a chorus was sung. On the other hand, in *Green v. Luby*, 177 Fed.

287 (S. D. N. Y. 1909), the whole song was used in connection with the imitation of another singer, and it was held not a fair use.

These cases do not involve literary parody or burlesque at all. In each of them the plaintiff was the owner of a copyrighted song and all or a part of his work was produced verbatim in the same form and manner as it might be presented by any commercial licensee of the right to perform a song. There was no attempt to transmute or change it in any way. Literary creation—authorship—by the accused was not involved.*

Not long after Trial Judge Carter's decision in the instant case, *Columbia Pictures Corp. v. National Broadcasting Company*, 137 Fed. Supp. 348 (1955), involving Sid Caesar's burlesque of the motion picture "From Here To Eternity", was also tried before him. In holding for the defendant, Judge Carter apparently receded from his opinion that a parody or burlesque must be tested by the same standard as any other appropriation, for conclusion of law No. 7 in that case states:

> "Since a burlesquer must make a sufficient use of the original to recall or conjure up the subject matter being burlesqued, the law permits more ex-

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*Similarly, Leon v. Pacific Tele. & Tele. Co., 91 F. 2d 484 (9th Cir. 1937), which the courts below cited [R. 254, 283], has very little, if anything, to do with the question of burlesque or parody of another's literary work. In the Leon case the plaintiff had compiled a telephone directory. Working from that directory alone, defendant physically rearranged it to place the information in a different order. He made no attempt to gather his own information or to do any original work whatever, although the field was open to him. See Hartford Printing Co. v. Hartford Directory & Pub. Co., 146 Fed. 332 (C. C. D. Conn. 1906). He neither added to nor changed the plaintiff's material in any way. There was nothing involved on the defendant's part except the labor of copying plaintiff's listings verbatim and reversing their arrangement.

> tensive use of the protectible portion of a copyrighted work in the creation of a burlesque of that work than in the creation of other fictional or dramatic works not intended as a burlesque of the original." (137 Fed. Supp. at 354; See Note: 56 Col. L. Rev. 585. 602-603 (1956)).

Judge Carter also appears belatedly to have recognized the applicability of the principle of fair use to burlesque to some extent, for he states, "Some limited taking should be permitted under the doctrine of fair use, in the case of burlesque, to bring about this recalling or conjuring up of the original." 137 Fed. Supp. at 350. The District Court's decision involving this burlesque was not appealed.

Textbooks and Treatics. Uniform support for the position that bona fide parodies and burlesques are "fair uses" is found in American textbooks and treatises, some of which are quoted below:

> "A bona fide burlesque is not an infringing copy. . . . A genuine burlesque of a serious work is not an infringement." 13 C. J. 1113, 1118.
>
> "A recognized form of review, although its nature is not always fully appreciated by its victims, is parody. It is entirely within the limits of fair use to make parodies or literary perversions of copyrighted works, even, it seems, in the form of drawings or cartoons." Weil, American Copyright Law, 432 (1917).*

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*The trial judge's statement that *"Weil, Ball and Amdur* are specifically contrary to defendant's position" [R. 248], overlooks the fact that the comments of these writers to which he refers as being "contrary" all deal with the mimicry cases. As we have pointed out, these cases do not at all involve the same elements of use as exist in the case of burlesques or parodies of literary works.

> "It is well settled that a parody is not an infringement of the right to copy . . . A peculiar application of the doctrine [of fair use] is also found in the law relating to parodies, which often approach actual copying, but have always been held legitimate." De Wolf, Outline of Copyright Law, 97, 142 (1925).

See also Spring, Risks and Rights, 177, 183, 186 (1952); Lindey, Plagiarism and Originality, 43 (1952).

D. Use of a Copyrighted Work in a Parody or Burlesque Should Be Deemed to Be a "Fair Use" Unless the Parody or Burlesque Supersedes or Is a Substitute for the Original.

Application of the principle of fair use to parody and burlesque requires the formulation of a standard for determining whether a particular parody or burlesque falls within the principle. In fashioning the test, the closely analogous cases referring to the use made by a literary critic or reviewer are the most instructive. Mr. Justice Story emphasized that to be fair, the critic's use must not "supercede" the original work or be a "substitute" for it. *Folsom v. Marsh*, 9 Fed. Cas. No. 4901, at 345 (C. C. D. Mass. 1841). Significantly, Mr. Justice Clifford used similar language in stating that reviewers may make use of copyrighted material so long as their review does not "supersede the original book" or become a "substitute" for it. *Lawrence v. Dana*, 15 Fed. Cas No. 8136, at 61 (C. C. D. Mass. 1869). Similarly, the court in *Farmer v. Elstner*, 33 Fed. 494, 496 (C. C. E. D. Mich. 1888), affirms the reviewer's right to make extracts so long as they "are not made as a cover for a republication."

A similar standard has been laid down in other leading fair use cases. Lord Ellenborough in *Cary v. Kearsley*,

170 Eng. Rep. 679, 680 (1803), indicated that an author could not use a copyrighted essay if the material he added was "only to colour the publication of the original essay, and make that a pretext for pirating it." In *Roworth v. Wilkes*, 170 Eng. Rep. 889, 890 (1807), which involved the use of plaintiff's book on fencing in defendant's encyclopedia, Lord Ellenborough said that the question was "whether the defendant's publication would serve as a substitute for it." In *Karll v. Curtis Pub. Co.*, 39 Fed. Supp. 836, 837 (E. D. Wisc. 1941) (see p. 25, *supra*), the court emphasized that the magazine article could not have diminished the value of the song involved, since no music was set out in the article.

Building on these precedents, the proper standard of fair use for application to parody and burlesque is whether the copyrighted work is used in such a way that the parody or burlesque supersedes or is a substitute for it. Such a standard is consistent with the primary purpose of the copyright clause; it promotes the useful arts by assuring reward to *both* the author of the original and the parodist. Under this standard, an author of a parody or burlesque could make use of a copyrighted work in his new creation, but under the principles of fair use he would have to stop short of using the copyrighted work in such a way that the parody or burlesque would supersede or become a substitute for it.

There is no pretense that this is a litmus test which can be easily and quickly applied. Mechanical standards are peculiarly out of place in the copyright field. Mr. Justice Story stated in *Folsom v. Marsh*, 9 Fed. Cas. No. 4,901, at 344 (C. C. Mass. 1841):

> "Patents and copyrights approach, nearer than any other class of cases belonging to forensic dis-

> cussions, to what may be called the metaphysics of the law, where the distinctions are, or at least may be, very subtile and refined, and, sometimes, almost evanescent."

Judge Learned Hand's classic statement of the test for infringement in an ordinary case not involving fair use is followed by his comment that "Nobody has ever been able to fix that boundary [of infringement], and nobody ever can." *Nichols v. Universal Pictures Corp.*, 45 F. 2d 119, 121 (2d Cir. 1930).* Speaking of the ordinary infringement standard, Judge Hand has also said, "The test is necessarily vague and nothing more definite can be said about it." *Shipman v. RKO Radio Pictures*, 100 F. 2d 533, 538 (2d Cir. 1938) (concurring opinion). Similarly with respect to parody and burlesque, we believe that the most that can be helpfully said is that the author of such a work must not use the copyrighted work in such a way that the parody or burlesque supersedes or is a substitute for the original.

The proper application of such a standard would obviate the Court of Appeals' fears that a dramatic work might be appropriated in its entirety "merely by introducing comic devices of clownish garb, or movement, or facial distortion of the actors, and presenting it as a burlesque" [R. 283]. A work which attempted to supersede the original in such a way can be recognized as an unfair use without any necessity for stifling the creation of bona fide parodies and burlesques.

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*"While we are as aware as anyone that the line, wherever it is drawn, will seem arbitrary, that is no excuse for not drawing it: it is a question such as courts must answer in nearly all cases." (*Id.* at 122.)

Indeed, the failure of the Court of Appeals to accord parody and burlesque a right of fair use appears to stem from a misunderstanding of the nature of those arts. This is apparent in the court's reference to a serious dramatic work being "copied practically verbatim, and then presented with actors walking on their hands or with other grotesqueries" and other comments to the same effect [R. 284]. What the court is describing is not a bona fide parody or burlesque, but a subterfuge in which the basic literary values of the original are pirated. The genuine burlesque uses copyrighted material to remind the audience of the mood and content of the "original," but then "it takes off into the blue. . . . It leaves out much, but it constantly comes back, so to speak, to refresh itself to [from] the original, and then takes off again" [R. 156].* The true burlesque or parody never supersedes the original, but rather, through transformation of the tone and key of the original, is an independent work of art [R. 149]. It is this art form, not a "wholesale copying" or substitute for the original, which is entitled to the right of fair use.

E. The Long-Established Custom of Parody and Burlesque Supports the Right of the Authors of Such Works to Make a Fair Use of the Copyrighted "Original."

As we have shown, literary history abounds with examples of burlesques and parodies of particular literary works, using story lines, characters and situations as a springboard for new, imaginative and creative efforts. Such parodies and burlesques have been the publicly accepted custom since long before the first Copyright Act

*The burlesque or parody "amuses by its mixture of likeness and unlikeness to the original." Fowler, Modern English Usage, "burlesque."

in 1790. Under these circumstances, if Congress had intended that authors should be protected from having their works burlesqued or parodied, "it would seem," as has been said in a closely analogous circumstance, that "Congress would have made specific provision therefor." *Warner Bros. Pictures, Inc. v. Columbia Broadcasting System, Inc.*, 216 F. 2d 945, 950 (9th Cir. 1954); and see *White-Smith Music Co. v. Apollo Co.*, 209 U. S. 1. Yet Congress has taken no action indicating any intent to limit the rights of the parodist or burlesquer. The acquiescence of Congress in the publicly accepted custom of burlesque is a legislative recognition that the Act never was intended to and did not prohibit such custom.

Not only Congress, but all of those concerned have acquiesced in the understanding that the burlesquer and parodist have a right of fair use. Almost from their inception, radio and television have burlesqued books, plays, and especially motion pictures. Since 1932 Jack Benny alone has presented burlesques of sixty-two current motion pictures, including those produced by all of the leading production companies [R. 57-61]. If the motion picture companies had been of the opinion that a burlesque of their expensive pictures constituted an infringement of their valuable statutory rights therein, they would have long since made that position clearly known. Yet, in all recorded history, no author or copyright proprietor (with the sole exception of Eleanor Glyn and perhaps the licensee of "Tarzan and the Apes" as indicated pp. 40-42, *supra*) has ever before made legal claim that a bona fide burlesque or parody of any book or play was an infringement of his copyright.

Where all of the people so immediately concerned—authors and publishers of literary and dramatic works

and producers of motion pictures, including respondent Loew's, have acquiesced for a long period of years in the understanding that the use was not an infringement, such acquiescence constitutes an interpretation of the Act which is entitled to substantial weight under established rules of statutory construction. *United States v. State Bank of North Carolina*, 6 Pet. 29, 38-39; *United States v. Farrar*, 38 F. 2d 515, 517 (D. C. Mass. 1930); *Wells Fargo & Co. v. Mayor and Aldermen of Jersey City*, 207 Fed. 871 (D. C. N. J. 1913); 50 Am. Jur., Statutes, pp. 319-320. The trial court misinterpreted our contention in refusing to accept this argument on the ground that there was no proof that all the literary burlesques and parodies in the long history of the art were done over the objection of the authors burlesqued. We are not relying upon any established custom to infringe as supporting a continuation of a right to infringe; we are asserting that the failure of anyone to claim that a burlesque or parody *was* an infringement is evidence of the generally accepted belief that the copyright law did not extend to protection against this type of use.

American courts have been uniformly hesitant to extend copyright protection by interpretation, preferring instead to leave such matters to Congress. *White-Smith Music Co. v. Apollo Co.*, 209 U. S. 1; see *Fitch v. Young*, 230 Fed. 743, 745 (S. D. N. Y. 1911). In accordance with that wise policy, if the parodist's or burlesquer's right of fair use is to be limited in some way after all these years, the matter is one for the careful consideration of Congress in whose hands the Constitution placed power to grant copyright monopolies.

II.

The Burlesque "Autolight" Is a Fair Use of "Gaslight."

The issue as to whether the burlesque "Autolight" is a fair use of "Gaslight" has never been tried. The courts below failed to recognize the right of the author of a parody or burlesque to make a fair use of a copyrighted work. Thus, the findings and conclusions that Autolight infringed respondent's copyrights are not pertinent to the issue actually involved. Petitioners believe that it may be appropriate for the Court to remand the case to the trial court for a determination whether "Autolight" constitutes a "fair use" under the standards set forth above.

Should the Court, however, wish to examine the works involved and determine itself whether "Autolight" is a fair use, there is no doubt but that the Court should hold that it is a proper use of the copyrighted work "Gaslight". Consideration of the synopses of "Autolight" and "Gaslight" set forth in the Appendix, pages 1, 6, or of the films themselves will make it clear that "Autolight" does not supersede, nor is it a substitute for "Gaslight" and that it is, in short, a fair use of "Gaslight."

"Autolight" was an undisguised burlesque of "Gaslight." To burlesque, it necessarily had to use recognizable elements of "Gaslight" to remind the audience of that picture. Otherwise the burlesque had no point. But it took only what was reasonably necessary to produce the new artistic creation—the burlesque.

The great force and impetus of the picture "Gaslight" is created through the building up, brick by brick, of an entire structure. Each scene adds its small but effective

strength and weight to the development of the picture's tone. The imaginative treatment of incidents, scene by scene, creates the motivation and characterization and the heightened atmosphere of suspense which culminates finally in the sweeping climax. It was not the bare bones of the story that gave "Gaslight" its values; it was the expression, treatment and development of those bare bones—the deft way in which the author projected into reality an idea. The plot structure of "Gaslight" was of course necessary, but the skill or genius of the author did not lie in its concoction, nor did the value of the play to the beholder arise from that framework.

The writers of "Autolight" used absolutely none of the expression, treatment or development which made "Gaslight" a good, or even a great, motion picture. They used its bare bones—the greatly abbreviated story line and a very few of its incidents. They mocked in an exaggerated and ludicrous fashion the leading characters in the same fashion as has been done immemorially. What they did with these bare bones was to adorn them with their *own* treatment, expression and development, thereby creating something new. They could not have created a burlesque of "Gaslight" without using at least these bare bones or their equivalents.*

Everything that was serious, tense and dramatic in the original becomes hilarious in the burlesque. The whole tone of the original which the title, the setting, the cast, and the naked events have recalled to mind, is instantly transformed into the comic. Each happening that had its tremendously dramatic impact on the viewers

*Dr. Baxter contrasted the literary values of the two works [R. 153-155].

of "Gaslight" is subjected to a contrast with absurdity. Each full-statured character is contrasted with its caricature. The pictures on the wall, which in "Gaslight" are discovered missing, are turned upside down in the burlesque which causes them to "run," with comic results. The wife is terrified—of Jack Benny! Her forgetfulness consists of hiding a horse in a closet! The detective doubles as a carpenter—he knows about the house because he built it! And so on.

In the entire motion picture there is not even a single chuckle and almost never a smile; in the burlesque there is scarcely an instant's interruption of the audience's laughter. That result is produced, and could only be produced, by reason of the talents and ability for the construction of comedy possessed by the writers of "Autolight"—talents and abilities which in their very different way are perhaps equal to those of the writers of "Gaslight", and which are exercised just as much, if not more, in creating this burlesque as they would be in creating any other comic work.

The contemporaneous reviews of the motion picture "Gaslight" appearing in periodicals gave to the public much more information concerning the picture—much more of the story line—than could ever be obtained from watching the 15-minute performance of "Autolight."* Yet, as the cases cited above (pp. 22-23) make clear,

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*See "Life," May 22, 1944; "Time," May 22, 1944. "Life" contained four full pages of pictures and comments outlining the story in detail and comparing the motion picture with the stage play.

no infringement of copyright could be claimed by Loew's against any of the newspapers or magazines which reviewed the original motion picture. The use which "Autolight" made of the bare bones of "Gaslight" was as much a fair use of respondent's copyrighted material as was the more extended use of the same bare bones in the allied but no more firmly established field of critical review.

Not only did the writers of "Autolight" use less than the critics who reviewed the picture, but also less than did the authors of innumerable burlesques and parodies as exemplified by those summarized in the Appendix, and just as was the case in those works, every element which Benny's writers used was changed, inverted and metamorphosed into a diametrically opposite set of literary values from those created by the authors of "Gaslight." It was what the authors of "Autolight" *did* with the bare bones of "Gaslight" that produced this new and original and extremely funny television program.

"Autolight" is no plagiarism. Nobody could possibly think on seeing "Autolight" that he was seeing a performance of "Gaslight," or that he was seeing a copied version of "Gaslight." Upon seeing "Autolight," the viewer would no more be deterred from seeing "Gaslight" than he would have been by the fact that he read the story in the reviews in the current newspapers and periodicals. The two works are so diametrically opposite that neither could in any way supersede or be a substi-

tute for the other. They are directed towards two entirely different facets of human emotion and interest.

"Autolight" was a new and independent literary work. It was not a "servile imitation." It had its own values and its own place in the field of entertainment. It was a creative work in an established field of useful art. The use of copyrightable material necessary to its production as a work in that field was a fair use in accordance with the Constitution's command that the copyright law shall "promote . . . useful Arts."

Conclusion.

For more than two thousand years, free men have laughed at themselves and their works through the medium of parodies and burlesque. It is true that Dr. Joseph Goebbels thundered: "There are certain values in the life of a nation which *must* not be laughed at!" But it was John Wesley who observed: "I believe the glory of sporting with sacred things is peculiar to the English nation". It would be most ironic if the Copyright Act, whose constitutional right to exist depends upon its promotion and encouragement of the intellectual products of free minds in a free country, should be relied upon to deprive us and future generations of the full play of the talents of another Fielding, Thackeray or Harte. We do not believe the Act should be so interpreted. Rather, we think, the parodist and burlesquer should be guaranteed by the law the full scope of a fair use of their object's work, within such limits as will not

supersede that work and thus deprive its author of his fair reward, but to the end that coming generations may also enjoy a new "Shamela", "Rupert"—or "Autolight".

It is respectfully submitted that the judgment below should be reversed.

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August, 1957.